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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/665,670
Filing Date: September 18, 2003
Appellant(s): FOCHT ET AL.

Bridget Murray
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 3-23-09 appealing from the Office action mailed 7-23-09.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,612,307	Chambers et al.	3-1997
6,534,456	Hayward et al.	3-2003
US 2003/0180246 A1	Franz et al.	9-2003

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1, 2, 4-5, 7-9, 14 and 19-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over US 5,612,307 to Chambers in view of US 6,534,456 to Hayward et al.

Chambers discloses an aqueous composition that comprises a cleansing portion and a moisturizing portion, wherein the former comprises 1% to 35% surfactant, water, thickener such as gaur gum (col. 2, col. 3, L 15-16, example formulation B of col. 8) and the latter comprises an emollient that reads on the instant hydrophobic material because Chambers discloses the same oils, lipids etc., (col. 2) that are described in the instant invention. The composition of Chambers upon dispensing forms individual stripes of the benefit agent and base formulation (surfactant) (col. 8, L 65-67). The benefit phase of Chambers does not contain water or surfactants and hence reads on the instant substantially anhydrous limitation (examples in col. 11, L 11-20). Instant specification describes certain hydrophobic materials that possess the claimed solubility parameter (page14). Chambers also describe the same hydrophobic materials as that described in the instant disclosure and hence the hydrophobic materials of Chambers possess the claimed solubilities, Shear Index and consistency values (claim 7) are

inherent to the emollients of Chambers. The composition of Chambers can be in the form of liquids or semi-liquids (col. 6, L 43-44) and the width of the stripes may be 1000 microns (see claim 1 of Chambers). With respect to claim 19, the claimed method of using the composition is inherent to the composition of Chamber, because the composition is meant to be used by applying the required amount and rinsing the skin or hands with the water after washing. The benefit phase according to Chambers can constitute 0.1% to 50% of the composition (col. 3, L 17-18) whereas the surfactant in the cleansing phase is present between 3% and 30%. In col. 8, l 31-33, Chambers teaches combining 6% oil (benefit) with 94% base (cleansing phase) and thus is with the claimed range of the cleansing and benefit phases. Example compositions in col.8 of Chambers further contain electrolytes such as sodium chloride and sodium citrate; and also Guar hydroxypropyl trimonium, which read on instant cationic polymer.

Chambers fail to teach the claimed limitation that the cleansing and the benefit agents are in physical contact within the said package and instead teaches separating the two components thus avoiding direct contact with another so as to prevent any adverse actions that may occur between the two components and resulting in ineffective deposition of the benefit agent.

The teachings of Hayward constitute an improvement over the teachings of Chambers as seen from the discussion of the teachings of Chambers in the introduction section of Hayward. Hayward teaches that Chambers and other prior art require that the composition is separated until use so as to be able to deposit the benefit agents while still cleaning (col. 1, L 24-29, L 35-51). However, Hayward suggests an improvement

over the above compositions and suggests a packaged, stable, extrudable, multiphase liquid cleansing composition comprising a lamellar and an isotropic phase, wherein the two phases are rheologically compatible (same flow properties under conditions of filling, storage and product usage) and have visually different colors. Hayward also teaches that the lamellar phase may contain elevated amounts of emollients without affecting the product stability i.e., stable for at least 70 days at room temperature (col. 4). The composition of Hayward is present in a single container and is packed without any partitions i.e., are in physical contact (col. 4, L 1-50). The lamellar phase of the composition has a viscosity of 80,000 to 300,00 cps and the isotropic phase has a viscsosity of 15,000 to 100,000

Example 2 of Hayward teaches that the cleansing comprising surfactant, oil, glycerin, perfume, water, citric acid, crodalan, glycerin, EDTA, citric acid etc., and isotropic phase comprises a surfactant, water, sodium hydroxide, acrylate polymer etc. Thus, the two phases exemplified in the above composition reads on the instant stripes. Hayward teaches that the components can be packed without barriers when the viscosities of the two phases are compatible and that the rheological behavior of the cleansing surfactants depends on the microstructure. Hayward states that the principle benefit of the invention is the ability to suspend oil/emollient particles in one or more lamellar phases, which maintains good shear thinning properties and provides the consumer with good rheology (col.. 9, L 65-col.10, L 5 and col. 7, L 18-20) and further suggests ways to control the flow properties of both lamellar and isotropic phases

(flowing versus thick) so as to be able to pump the compositions together (col. 2, L 54-col. 3, L 17 and col. 3, l 56-col. 4, L 2).

Thus, it would have been obvious for one of an ordinary skill in the art at the time of the instant invention to optimize the rheological properties of two phases of the composition of Chambers so as to be able suspend both the phases together without any partition between the phases and thus extrude them together as stripes and still be able to maintain the viscosity because Hayward teaches several ways to alter the viscosity of the lamellar and isotropic phases so as to obtain a desired final product. Particularly, Hayward suggests that the lamellar phases can have high zero shear viscosity (non-Newtonian), which is in contrast to the rod or spherical micelles that exhibit Newtonian shear behavior i.e., viscosity increases with surfactant. Accordingly, a skilled artisan would have prepared the benefit and cleansing phases (of Chambers) having appropriate shear thinning viscosities suggested by Hayward such that the benefit agents are in contact with cleansing composition and yet be stable upon storage.

Note: Claims 10-13 were inadvertently rejected under this section, even though these claims have been separately rejected in the following section.

Claims 10-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over US 5612307 to Chambers in view of US 6534456 to Hayward et al, as applied to claims 1, 2, 4-5, 7-9, 14 and 19-29 above, and further in view of US 2003/0180246 to Frantz et al.

Chambers and Hayward discussed above fails to teach the claimed cleaning phase with alkanolamides.

Frantz teaches a stable surfactant composition for suspending components in compositions such as shampoos, cleansers, body washes etc., including striped compositions (abstract, para 0122). Frantz teaches that the surfactant containing suspending formulations (reads on instant cleansing phase) comprise an anionic surfactant, water, electrolyte and an alkanolamide, for imparting a free-lowing non-Newtonian shear thinning property to the composition (abstract, 0017-0048). In particular, the alkanolamides of 0045 have the same structure as that described in the instant specification and also employed for the same purpose as claimed. Therefore, it would have been obvious for one of an ordinary skill in the art at the time of the instant invention was made to employ the alkanolamide of Frantz in the cleansing phase of Chambers (containing a composition with the two phases in close contact as taught by Hayward) because Frantz suggests that the suspending phase comprising alkanolamide in addition to an anionic surfactant, water and an electrolyte (the cleansing phase of Chambers contain all three components col.8-formulation B) impart a free-flowing and non-Newtonian shear thinning property that provides the ability to suspend components or “benefit agents” such as oils, skin care agents etc (Frantz 0073-0076). A skilled artisan would have expected to achieve a free-flowing cleansing phase with a non-Newtonian shear thinning.

(10) Response to Argument

(A) Claims 1, 2, 4, 5, 7-9, 14 and 19-29 are non-obvious under 35 U.S.C. §103(a) over Chambers in view of Hayward.

Appellants argue according to MPEP 213.01 that when a combination of references is used to support a rationale of obviousness, the combination of references cannot (1) change the principle of operation of the primary reference or (2) render the prior art unsatisfactory for its intended purpose. Appellants argue that the combination of Chambers in view of Hayward is not sufficient to render the claims prima facie obvious because the principle of operation of Chambers would need to be modified in order to combine Chambers with Hayward. It is argued that in Chambers, the benefit agent and the base formulation (which comprises surface active agents) are physically separate to avoid the inconvenience of post mixing the two components. Appellants argue that conversely Hayward teaches a single partition less container containing lamellar and isotropic compositions and that the compositions are not dispensed in a predetermined ratio to have the desired effect. It is argued that Hayward, on the other hand, teaches simultaneous dispensing of the components and that modifying the teachings of Chambers with the teachings of Hayward would change the principles of operation of Chambers.

Appellants' arguments are not persuasive because a prima facie obviousness may be established if known work in one field of endeavor may prompt variations of it for use in either the same field or a different one based on design incentives or other market forces if the variations are predictable to one of ordinary skill in the art. It is

evident from the teachings of Hayward et al and Chambers et al that both references are assigned to the same assignee i.e., Unilever, and Hayward reference clearly provides the teachings of Chambers as a background information or prior art. In discussing the prior art, Hayward states that the disadvantageous of prior art multiphase cleansing and moisturizing compositions include instability, insufficient moisturizer, benefit agents sensitive to surfactants etc. Hayward suggests that their invention provides an improvement over the prior art (including that of Chamber reference) to overcome the said disadvantages. Hayward states that the two phases can be present in the same container without any partitions. In order to do so, Hayward teaches that the components can be packed without barriers when the viscosities of the two phases are compatible, preferably when the viscosities of the lamellar and isotropic phases are 80,000 to 300,000 and 15,000 to 100,000 cps. Hayward also suggests that the rheological behavior of the cleansing surfactants depends on the microstructure, where the lamellar micelles have high shear viscosity and yet very shear thinning thus easily extrudable (col. 2) and thus give “heaping” appearance and enhance moisturization. Thus, one of an ordinary skill in the art would be able to vary the rheological characteristics of the cleansing material of Chambers by varying the surfactants, whose microstructure contributes to the viscosity of the composition. A skilled artisan would further prepare the second composition with a completely miscible surfactant such that the composition is different from the first lamellar composition and yet the two components i.e., cleansing and benefit agents can be dispensed simultaneously. Thus,

the combination of Chambers and Hayward only provides an improvement of the prior art composition but does does not affect the principle.

Appellants argue that there is no motivation to modify Chambers with Hayward because the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose. It is argued that Chambers warns that the separation of the surfactant and benefit phase "avoids adverse interactions which may occur between these two components and resulting in ineffective deposition of the benefit agent." Because Chambers alleges that "ineffective deposition of benefit agent" would result when the compositions were placed in physical contact, as in the partionless container of Hayward, appellants argue that this modification would render the compositions unsatisfactory for their intended purpose.

Appellants' arguments are not persuasive because Hayward not only suggests preparing a stable and yet simultaneously dispensable composition that is in the form of stripes but also desires that the benefit agent in the lamellar phase is effectively deposited on the skin while the isotropic phase produces lather for cleansing (see col. 3, l 57-col. 4, L 2). Hayward also states that a further advantage of the invention is add elevated amounts of emollients (reads on skin benefit agents) to the lamellar phase without affecting the product stability (col. 4, L 37-40). Thus, the lamellar phase of Hayward is effective in depositing skin benefit agents. Besides, Hayward suggests providing both lamellar and an isotropic phase in a single composition that is extrudable, stable and yet remains separate. Hence the argument that the combination of the cited art teaches away from the claimed invention is not persuasive.

Claims 10-13 are non-obvious under 35 U.S.C. §103(a) over Chambers in view of Hayward in view of Frantz.

Appellant argue that the combination of Chambers in view of Frantz is not sufficient to render the claims prima facie obvious because the principle of operation of Chambers would need to be modified in order to combine Chambers with Frantz. Appellants argue that the benefit agent and the base formulation (which comprises surface active agents) are physically separate in Chambers, whereas they are not physically separated. (See Frantz, page 5 at [0074]) and in fact, the surface active agents and benefits agents are physically within the same composition, such that, the surface active agents of Frantz function as delivery systems for the benefit agents. (See Frantz, page 9 at [120] to [122]). Therefore, it is argued that modifying Chambers by not physically separating the surface active agents and the benefit agents in a partitioned package in view of Frantz would change the principle of operation of Chambers. Appellants argue that this modification would not allow the compositions of Chambers to be dispensed separately in a predetermined and precise ratio which achieves the desired effect of the invention. Appellants argue that because the principle of operation of Chambers would be changed, the combination of references is not sufficient to render the claims obvious. (See MPEP §2143.01 VI). Appellant argue that there is no motivation to modify Chambers with Frantz because the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose. It is argued that Chambers warns that the separation of the surfactant and benefit phase "avoids adverse interactions which may occur between these two components and

resulting in ineffective deposition of the benefit agent." Chambers, column 1, lines 65-67. Because Chambers alleges that "ineffective deposition of benefit agent" would result when the compositions were placed in physical contact, as in the compositions of Frantz, Appellants argue that this modification would render the compositions unsatisfactory for their intended purpose.

Appellants' arguments are not found persuasive because instant rejection is not over Chambers in view of Frantz and instead Chambers and Hayward in view of Frantz. As explained in detail in the preceding paragraphs, the teachings of Hayward comprise an improvement over that of Chambers. The teachings of Frantz have been combined with that of Chambers and Hayward for only alkanolamides and not for separating the surfactant with benefit agent. Additionally, except for claims 4, 28 and 29, none of the instant claims recite that the benefit phase is free of surfactants and thus allow for the presence of surfactants taught by Frantz. Further while claims 4, 28 and 29 recite substantially free of surfactant, the specification does not provide any definition for the term "substantially free" and hence allows for surfactants to be present. Further, the improvement taught by Hayward allows for the benefit phase containing benefit agent and the cleansing phase comprising a surfactant to be in proximity without having any disadvantages of Chambers. Therefore, the argument that the principle of operation of Chambers cannot be modified is not persuasive. Additionally, the Frantz provides the requisite motivation that an alkanolamide in the same component as that of instant claims i.e., a cleansing phase, along with a surfactant imparts a free-lowing non-

Newtonian shear thinning property to the composition. Hence, a skilled artisan would have expected the cleansing phase of the Chambers to be free flowing due to the non-Newtonian shear thinning property afforded by alkanolamides, which property is also desired by Hayward.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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